

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Erie Boulevard Hydropower, L.P.  
Project No. 7321**

**MACOMB PROJECT  
SETTLEMENT AGREEMENT**

*November 2, 2004*

**MACOMB PROJECT  
SETTLEMENT AGREEMENT**

**TABLE OF CONTENTS**

**1.0 INTRODUCTION.....1**

1.1 Term of the Settlement Agreement.....2

1.2 Offer of Settlement .....2

1.3 Agreements to be Incorporated as License Conditions.....2

1.4 Purpose and Goal .....2

1.5 Project Decommissioning .....3

1.6 Successors and Assigns.....3

1.7 Parties to Support Regulatory Approvals .....3

1.8 Agency Appropriations.....4

1.9 Establishes No Precedents .....4

1.10 Conventions and Definitions.....5

**2.0 GENERAL AGREEMENTS OF THE PARTIES .....6**

2.1 License Term .....6

2.2 Enforceability and Withdrawal Rights.....6

2.3 Rehearings and Judicial Review .....7

2.4 Water-Quality Certification – Withdrawal Rights.....7

2.5 Reopeners.....8

2.6 License Amendments.....8

2.7 Settlement Agreement Amendments .....9

2.8 Filings Prior to Issuance of New License .....10

2.9 Compliance with the National Historic Preservation Act.....10

2.10 Compliance with the Endangered Species Act.....10

2.11 Additional Agreements .....11

2.12 Interim Sediment Management Plan.....11

**3.0 MEASURES THAT THE LICENSEE WILL UNDERTAKE WITH RESPECT TO LICENSE CONDITIONS.....12**

3.1 Daily Impoundment Fluctuation as Part of Normal Operations .....12

3.1.1 Justification.....13

3.2 Baseflow .....15

3.2.1 Justification.....15

3.3 Sediment Management.....15

3.3.1 Justification.....16

3.4 Fish Movement and Protection.....16

3.4.1 Justification.....17

3.5 Fish Stocking .....18

3.6 Flow and Water Level Monitoring .....18

3.7 Fish Passage and Section 18 .....19

**4.0 RECREATION ENHANCEMENT COMMITMENTS (NOT TO BE INCLUDED IN LICENSE).....20**

4.1 Impoundment Car-Top Boat Launch.....20

4.2 Recreational Trail.....20

4.3 Additional Recreational Facilities.....20

November 2, 2004

---

**ATTACHMENTS**

- A Interim Sediment Management Plan for the Macomb Project
- B Proposed Recreational Improvements

November 2, 2004

## MACOMB PROJECT SETTLEMENT AGREEMENT

### 1.0 INTRODUCTION

#### *The Agreement and The Parties*

This agreement (Settlement Agreement) dated as of November 2, 2004, is made and entered into by and among the following entities who shall, except as otherwise noted, be referred hereafter to as a Party and collectively as "Parties":

- American Rivers
- American Whitewater (AW)
- Erie Boulevard Hydropower, L.P. (Erie or Licensee)
- Franklin County
- New York Rivers United (NYRU)
- New York State Conservation Council (NYSCC)
- New York State Department of Environmental Conservation (DEC)
- New York State Council of Trout Unlimited
- Town of Malone
- U.S. Department of the Interior (DOI): U.S. Fish and Wildlife Service (FWS) and National Park Service (NPS)
- Village of Malone

November 2, 2004

---

1.1 Term of the Settlement Agreement

This Settlement Agreement shall become effective when it has been executed by the above-referenced Parties and shall remain in effect, in accordance with its terms, throughout the term of the new license including any subsequent annual licenses.

1.2 Offer of Settlement

The Parties agree that within 30 days of the effective date of this Settlement Agreement, the Licensee shall file this Settlement Agreement with the Commission as an Offer of Settlement pursuant to 18 C.F.R. § 385.602.

1.3 Agreements to be Incorporated as License Conditions

The agreements in the Settlement Agreement are an integrated and indivisible set of measures intended to address non-power and power values relating to the licensing of the Macomb Project. The Parties agree that each term of this Settlement Agreement is in consideration and support of every other term and that it is essential that the FERC incorporate as license conditions in the new license, the commitments that the Licensee has agreed to undertake in Section 3.0 of this Settlement Agreement. The term "license conditions" is intended to mean numbered articles of the license.

1.4 Purpose and Goal

The purpose and goal of the Settlement Agreement is to provide for the continued operation of the Macomb Project with appropriate long-term environmental and recreational protection and mitigation measures that will meet diverse objectives for maintaining a balance of non-power and power values in the Salmon River and Macomb Impoundment.

The Parties, having given careful and equal consideration to non-power and power values, provide in the Settlement Agreement the terms and conditions for the

November 2, 2004

resolution of operational, fisheries, wildlife, water quality, and recreational issues raised by and analyzed by the Parties as they are applicable to the issuance of a license and water-quality certification for the Macomb Project.

1.5 Project Decommissioning

This Settlement Agreement does not include any provisions relating to decommissioning or dam removal of the Macomb Project in whole or part. With or without amendment of this Settlement Agreement, any Party may seek such further relief from the FERC regarding such decommissioning as the FERC may order, recognizing that no Party to this Settlement Agreement has been or is currently, advocating decommissioning of any Project facilities at this time. If and when the subject Project is decommissioned or retired during the term of any new license, the Parties will be entitled to take such positions on decommissioning issues at that time as they find appropriate.

1.6 Successors and Assigns

The Settlement Agreement shall be binding on the Parties and on their successors and assigns.

1.7 Parties to Support Regulatory Approvals

The Parties agree to support the issuance of a license and water-quality certification that is consistent with the terms of this Settlement Agreement. This support shall include, within the budgetary and staff constraints of the Parties, reasonable efforts to expedite the National Environmental Policy Act (NEPA) process to be undertaken by the FERC, as well as any other regulatory approvals that may be needed to implement provisions of the Settlement Agreement. For those issues addressed herein, the Parties agree not to propose or otherwise communicate, or encourage others to propose or communicate, to the FERC or to any other federal or state resource agency with jurisdiction directly related to the relicensing process any comments, certification, or license conditions other than those consistent with the terms of this Settlement

---

November 2, 2004

Agreement. For issues not addressed herein, for example, the term of the Project license, the parties remain free to advocate their positions in any forum, so long as it is consistent with the Settlement Agreement. Furthermore, this Settlement Agreement shall not be interpreted to restrict any Party's participation or comments in future relicensing of the Macomb Project.

#### 1.8 Agency Appropriations

Nothing in this Settlement Agreement shall be construed as obligating any federal, state, or local government to expend in any fiscal year any sum in excess of appropriations made by Congress, state or local legislatures or administratively allocated for the purpose of this Settlement Agreement for the fiscal year or to involve the DOI, FWS, or NPS in any contract or obligation for the future expenditure of money in excess of such appropriations or allocations.

#### 1.9 Establishes No Precedents

The Parties have entered into the negotiations and discussions leading to this Settlement Agreement with the explicit understanding that all offers of settlement and the discussions relating thereto are privileged, shall not prejudice the position of any Party or entity that took part in such discussions and negotiations, and are not to be otherwise used in any manner in connection with these or any other proceedings. The Parties understand and agree that this Settlement Agreement establishes no principles or precedents with regard to any issue addressed herein or with regard to any Party's participation in future relicensing proceedings and that none of the Parties to this Settlement Agreement will cite this Agreement or its approval by the FERC or the DEC as establishing any principles or precedents except with respect to the matters to which the Parties have herein agreed.

November 2, 2004

### 1.10 Conventions and Definitions

The Parties agree that the following conventions and definitions should have the meanings so noted throughout this Settlement Agreement.

**Baseflow:** The required minimum instantaneous instream flow, measured in cubic feet per second (cfs), to be continuously released from the Project's tailrace downstream of the Macomb Project.

**Impoundment Fluctuation:** Defined within this agreement as a specific range of impoundment elevations associated with normal Project operation that is measured in the downward direction from a specific reference point such as permanent crest of dam.

**Left/Right Bank:** The left or right bank as seen looking downstream.

**License Issuance:** For purposes of this Settlement Agreement, "License Issuance" means that the FERC issues a new license consistent with the terms of the Settlement Agreement relative to the particular enhancement being considered.

**Licensee:** Erie Boulevard Hydropower, L.P. (Erie), or its successor.

**Normal Operation:** The daily operation of the Macomb Project that may involve utilization of allowable impoundment fluctuations as needed to produce energy.



November 2, 2004

**2.0 GENERAL AGREEMENTS OF THE PARTIES**

**2.1 License Term**

The Parties agree, based upon and in consideration of the Settlement Agreement provisions identified in Section 2.2, that the license should be for a term of 35 years from the date of license issuance, and agree to join in a request for rehearing if a license is issued for less than 35 years from date of license issuance.

**2.2 Enforceability and Withdrawal Rights**

The Parties agree that it is their intent, and this Settlement Agreement is based upon, and in consideration of their expectation that Sections 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, and 3.7 will be included in any license issued as numbered license articles and that the Commission will enforce these provisions. If, in making its licensing decision, the Commission determines that any of the sections identified herein are not within its jurisdiction to enforce, the Parties request that it expressly and clearly notify the Parties of this in the licensing order. If the Commission does not so expressly identify any of the provisions of the sections identified herein, then the Parties will, in reliance thereon, proceed as though each of the sections identified herein are enforceable by FERC.

If the FERC should, contrary to the integrated and indivisible nature of this Settlement Agreement described herein in Section 1.3, issue a new license that materially and significantly modifies any of the measures identified in Sections 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, and 3.7 and if the new license is not thereafter satisfactorily modified as a result of the filing of a request for rehearing as provided in Section 2.3, and if any Party thereafter determines that its interests will be materially and adversely affected by the change or the changes so made by the Commission, it may, after first providing written notice of its intention to do so to the other Parties together with a written explanation of its reasons for doing so, withdraw from this Settlement Agreement. Thereafter the Settlement Agreement shall have no force and effect and the Parties shall in any subsequent administrative and judicial proceedings take the position that the Settlement

November 2, 2004

Agreement is not available to support the Commission's public interest determination, and that said determination is invalid to the extent it relies on the agreement of the parties.

### 2.3 Rehearings and Judicial Review

The Parties agree that none of them will file or support a request for rehearing of any new license unless: the license contains conditions that are materially inconsistent with the terms of this Settlement Agreement; the license omits as license conditions terms of the Settlement Agreement that the Parties have agreed should be included as license conditions; or the FERC determines that it will not enforce any of the provisions of the Settlement Agreement that the Parties have agreed should be included as conditions of the new license, as expressly identified in Section 2.2. In the event that any Party decides to file a request for rehearing in accordance with the terms of this provision, it will provide written notice of its intention to do so to all the other Parties at the earliest practicable time and thereafter, if the request concerns matters within the scope of the Settlement Agreement, the other Parties will join in the rehearing request or file an appropriate and supportive rehearing request of their own. Thereafter, if any Party, following the issuance of a FERC Order on Rehearing, elects to file a petition for judicial review with respect to the matters covered by this provision, the other Parties will support such a petition to the extent reasonably possible. The Parties recognize that participation by the DOI in such judicial review is dependent on approval by the U.S. Department of Justice, and participation by State agencies is dependent on approval by the Attorney General of the State of New York.

### 2.4 Water-Quality Certification – Withdrawal Rights

The Parties agree that they will support the issuance by the DEC of a Section 401 Water-Quality Certification that is consistent with the provisions of this Settlement Agreement for the Macomb Project. If the DEC should issue a Section 401 certification for the Project that is materially inconsistent with the provisions of this Settlement Agreement, any Party can withdraw from this Settlement Agreement by providing written

November 2, 2004

notice of its intention to do so to the other Parties within 60 days from the date of the issuance of any such certification or, in the event any Party seeks judicial or agency review, 60 days from the date of the denial of such review. The DEC will distribute to the Parties copies of the Section 401 certification that is issued.

## 2.5 Reopeners

The Parties agree that, except as provided herein, this Settlement Agreement is not intended to limit or restrict the ability of any Party to petition the FERC pursuant to any reopener condition contained in the new license, including any exercise by the Secretary of the DOI relating to the Secretary's fishway prescription authority under § 18 of the Federal Power Act. No such petition may be filed that would, if granted, be materially inconsistent with this Settlement Agreement, or cause other portions of the Settlement Agreement to be reopened, unless the Party that files the petition has substantial evidence that a material change in circumstances has occurred including any material change made by the Commission to the terms of this Settlement Agreement that provides good cause for the filing of the petition. Before any Party files such a petition with the FERC, it shall provide at least 60 days written notice of its intention to do so to all the other Parties and, promptly following the giving of notice, has consulted with the other Parties regarding the need for and the purpose of the petition. In the event such a petition is filed, the filing Party shall include with its filing documentation of its consultation with the other Parties and a summary of their recommendations and of its response to those recommendations. The filing Party shall also serve a copy of its petition on all the other Parties, and will not oppose motions or notices of intervention filed by other Parties. Parties that refuse to support such a reopener petition shall explain their reasons in writing at the time they communicate their decision on the proposed reopener petition.

## 2.6 License Amendments

The Parties agree that, except as provided herein, nothing in this Settlement Agreement is intended to limit or restrict the ability of the Licensee to seek amendments

November 2, 2004

of any new license. The Licensee may only seek a license amendment that would be materially inconsistent with the provisions of this Settlement Agreement if it has substantial evidence that a change in circumstances has occurred that provides good cause for the filing of the amendment and has provided the Parties at least 60 days written notice of its intention to do so and, promptly following the giving of notice, has consulted with the Parties regarding the need for and the purpose of the amendment. In no event, however, shall the Licensee seek such a license amendment unless it has first secured the consent of the DEC and the FWS, and, for any amendment to be filed prior to the tenth anniversary date of the new license, shall also have secured the consent of a majority of the other Parties to the Settlement Agreement. Parties that refuse to support such a license amendment shall explain their reasons in writing at the time they communicate their decision on the proposed license amendment. For other license amendments that just relate to the license terms set forth in this Settlement Agreement, the Licensee shall provide all Parties at least 30 days notice of the proposed amendment and, if requested to do so by any Party, shall consult with the Parties regarding the amendment and defer the filing for another 30 days. In any application for an amendment that relates to any of the terms and conditions of this Settlement Agreement, the Licensee shall document its consultation, summarize the positions and recommendations of the Parties, and provide its responses to those positions and recommendations. The Licensee shall serve a copy of any application for amendment subject to this Section upon the Parties at the time of the filing. The Licensee will not oppose an intervention request filed in a timely manner by any Party in an amendment proceeding involving the license.

## 2.7 Settlement Agreement Amendments

The Parties agree that, except as provided herein, nothing in this Settlement Agreement is intended to limit or restrict the ability of any Party to seek an amendment to this Settlement Agreement during the effective period of the license with respect to matters not addressed in the license. Any Party proposing such an amendment to this Settlement Agreement shall provide all Parties with at least 60 days written notice of the proposed amendment. No amendment will be effective if any Party objects to the

November 2, 2004

amendment. Any Party that abstains may not object to and will be bound by any amendment in which all other Parties concur. After such notice and consultation, if all Parties either concur with or do not object to the proposed amendment, the Party making the proposal shall secure signed agreements to the amendment from all Parties who concur with the proposal. The Licensee will file the amendment with the FERC for informational purposes, or the parties may file an application for license amendment or request for reopener if required to put the amendment to the Settlement Agreement into effect.

## 2.8 Filings Prior to Issuance of New License

Prior to the issuance of the new license pursuant to this Settlement Agreement neither the Licensee nor any Party shall make any filing with the FERC seeking a modification of Project works under license or of the operation of the Project unless such a modification involves an emergency or is not materially inconsistent with this Settlement Agreement and the Party who wishes to make the filing provides the other Parties at least 30 days notice of such a filing.

## 2.9 Compliance with the National Historic Preservation Act

The Licensee will develop a Historic Properties Management Plan (HPMP) in consultation with the St. Regis Mohawk Tribe and the New York State Office of Parks, Recreation, and Historic Preservation.

## 2.10 Compliance with the Endangered Species Act

Consultation with the DEC and the FWS has established that, except for some transient individuals, there are no federally- or state-listed threatened or endangered species in the area of the Macomb Project at this time. As of October, 2004, except for occasional transient individuals, no Federally listed or proposed endangered or threatened species under the FWS jurisdiction are known to exist in the project impact area. In addition, no habitat in the project impact area is currently designated or proposed "critical

November 2, 2004

habitat” in accordance with provisions of the Endangered Species Act (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.). Therefore, no further Endangered Species Act coordination or consultation with the FWS is required. Should project plans change, or if additional information on listed or proposed species or critical habitat becomes available, this determination may be reconsidered.

The above comments pertaining to endangered species under FWS jurisdiction are provided pursuant to the Endangered Species Act. This response does not preclude additional Service comments under other legislation.

#### 2.11 Additional Agreements

The Parties agree that the Licensee should not be required (1) to provide upstream or downstream fish movement structures unless prescribed by the DOI under Section 18 of the FPA; (2) to test the effectiveness of any, or all, components of the fish movement or protection measures and/or structures, (3) to make qualitative or quantitative determinations of fish entrainment and/or mortality; (4) to provide compensation for any fish entrainment or mortality associated with the operation of the facility in accordance with this Settlement Agreement and/or (5) to increase the level of protection or movement as agreed to by this Settlement Agreement for the term of the license, unless prescribed by the DOI under Section 18 of the FPA.

#### 2.12 Interim Sediment Management Plan

The Licensee agrees to implement the attached Interim Sediment Management Plan (ISMP) (see Attachment A) within 30 days of the signature of this Settlement Agreement, pending its inclusion in the license article pursuant to Section 3.3.

November 2, 2004

**3.0 MEASURES THAT THE LICENSEE WILL UNDERTAKE WITH RESPECT TO LICENSE CONDITIONS**

**3.1 Daily Impoundment Fluctuation as Part of Normal Operations**

Within 18 months of license issuance, the Licensee shall limit daily impoundment fluctuations as part of normal operation within the Macomb impoundment as specified in Table 3-1.

**Table 3-1  
Macomb Hydroelectric Project  
Normal Impoundment Fluctuation**

<b>River Flow (cfs)</b>	<b>Normal Impoundment Fluctuation</b>
Greater than 125	0.25-foot measured in downward direction from top of crest of spillway. <sup>1</sup>
125 or less	Run-of-river with outflow through the turbine (or over the spillway crest) equaling inflow and the impoundment level maintained at or above spillway crest.

1. Although the Licensee will make a good faith effort to limit the normal impoundment fluctuation to 0.25-foot when the river flow exceeds 125 cfs, for the purposes of FERC compliance, only drawdowns below 0.5-foot will be reportable. This additional 0.25-foot helps address the natural fluctuations in river flow and the limitations of the Project's controls.

Normal impoundment fluctuations specified in Table 3-1 shall be defined as the maximum drawdown limit associated with the operating range necessary to achieve normal operation. The normal impoundment fluctuation limit shall be measured in the downward direction from the crest of dam (elevation of 570.7). Water surface elevations higher than the elevation from which any downward fluctuation is measured are considered outside of the normal impoundment fluctuation zone, and variations of such elevations are not considered as a utilization of the normal impoundment fluctuation.

The Licensee will at all times make a good faith effort to maintain impoundment fluctuation within 0.25-foot when river flow exceeds 125 cfs; the Parties agree that only when the impoundment drops in excess of 0.5-foot from the crest of dam shall a notification to the FERC and the DEC be made. When the impoundment drops to 0.5 foot

November 2, 2004

from the crest the Licensee shall notify the FERC and the DEC as soon as possible, but not later than ten (10) business days after each such incident. On January 31 of the following year, the Licensee shall provide signatories to this Settlement Agreement with a list of dates and the associated period of time for all drawdowns in excess of 0.25-foot below the crest of dam during the prior year. This report will be submitted annually. The DEC reserves its right to review the annual report, as well as any available data pertaining to seasonal variations and temperature, and to determine whether (a) the operational limitations contained in this Settlement Agreement are sufficient to protect downstream resources, or (b) additional operational limitations are required in order to maintain compliance with the DEC's Water Quality Certificate or New York State's water quality standards. In the event that the DEC determines that additional operational limitations are so required, the DEC will consult with the Licensee before taking measure to amend or modify the Water Quality Certificate, consistent with the provisions of Section 2.6 of this Settlement Agreement.

Impoundment fluctuation limitations may be curtailed or suspended if required by operating emergencies beyond the control of the Licensee, including security, and for short periods upon prior mutual agreement between the Licensee and the DEC. If the limitations are so modified, the Licensee shall notify the FERC and FWS as soon as possible, but no later than ten (10) business days after each such incident.

### 3.1.1 Justification

The Salmon River in the vicinity of the Macomb Project is a very high quality trout stream. The main stem of the Salmon River is managed for brown and rainbow trout. Both wild and stocked brown trout contribute to the fishery, while the rainbow trout are sustained primarily by stocking. Brook trout are abundant in tributaries to the Salmon River and are present in portions of the main stem.

The trout, and the invertebrates that provide their primary forage, are very dependent on the free flowing habitat of the Salmon River. That habitat also provides the most popular angling opportunities on the river. Water levels in the free flowing habitat



November 2, 2004

quickly respond to flow fluctuations caused by dam operations. While the mobility of fishes may allow them to avoid dewatering, the much less mobile invertebrate populations, and the completely immobile fish eggs, can be severely impacted.

Based on field observations, the Parties concluded that limiting daily impoundment fluctuations to 0.25-foot will help improve conditions in downstream habitats in the event of a unit trip. A unit trip will result in a reduction of downstream flow until a time when the unit could be restored or spilling over the crest of the dam occurs. Reduction of downstream flow typically has an adverse impact on the free flowing downstream habitat, most often demonstrated by dewatering of sensitive habitat areas. The reduced fluctuation (from the current 1.0-foot allowance) provides a limited amount of time for which downstream flow may be reduced.

Although the Parties agree to limiting impoundment fluctuations to 0.25-foot when river flows are in excess of 125 cfs, the Parties recognize the natural variability in river flows and the limitations of the Project controls and agree to allow an additional 0.25-foot impoundment fluctuation tolerance before non compliance reporting is required. However, the Parties agree that impoundment fluctuations between 0.25 and 0.5-foot are not desirable for operational purposes, or for the protection and improvement of upstream and downstream habitat. Therefore, the Licensee agrees to make a good faith effort to maintain impoundment fluctuations within 0.25-foot when river flows exceed 125 cfs.

The Parties concluded that operating the Project as run-of-river when river flow is 125 cfs or less, as described in Table 3-1, further reduced the potential for downstream impacts resulting from a unit trip. Under this scenario, if the unit were to trip, and thus reduce the associated turbine discharge, downstream flow disruption would be minimized as water would immediately begin spilling over the dam.

Under both scenarios, the habitat and limited wetlands associated with the Project's impoundment would benefit through the reduced fluctuation (currently 1.0-foot).

November 2, 2004

### 3.2 Baseflow

The Licensee shall maintain a baseflow of 125 cfs (or inflow to the Macomb impoundment, whichever is less) from the Project's tailrace. The requirements of this baseflow commitment may be curtailed or suspended if required by operating emergencies beyond the control of the Licensee, including security, and for limited periods upon prior mutual agreement between the Licensee, FWS, and DEC. If the requirements of this commitment are so modified, the Licensee shall notify the FERC as soon as possible, but no later than ten (10) business days after each such incident.

#### 3.2.1 Justification

Party representatives observed base flow conditions downstream of the Project including a baseflow at 125 cfs. In particular, the Party representatives observed the habitats downstream of the Macomb powerhouse (e.g., at the angler access trail, Cargin Road bridge, and Flat Rock Road bridge). Based on familiarity with the Salmon River, as derived from previous field visits to the Macomb Project area, the Parties concluded that these habitat areas were representative of similar habitat areas downstream of the Project. In addition, a macroinvertebrate study was conducted that verified that the existing baseflow of 125 cfs has sustained a healthy ecosystem in the Salmon River downstream of the Project. Taking these study results into account in conjunction with the field observations, the Parties concluded that 125 cfs provided sufficient flow to support such habitat areas.

### 3.3 Sediment Management

The DEC water quality certificate will incorporate the attached Interim Sediment Management Plan (ISMP) as a component of this Settlement Agreement and will be binding upon the Licensee. Upon license issuance, the Licensee will continue to implement the attached ISMP. The Licensee will cooperate with the DEC in the development of a Final Sediment Management Plan (FSMP) regarding the appropriate procedural measures needed to incorporate the FSMP into the Water Quality Certificate

November 2, 2004

and the license. The FSMP will become binding on the Licensee in lieu of the ISMP upon approval by the Commission.

Implementation of the attached ISMP may be curtailed or suspended if required or caused by high water events or operating emergencies beyond the control of the Licensee, including security, and for short periods upon prior mutual agreement between the Licensee and the DEC.

### 3.3.1 Justification

The Parties agree that the attached ISMP is a practical approach to managing sediments associated with the Project and the Salmon River. The Plan was developed through consultation with the Parties, including the DEC, and is based upon site observations, the Aquatic Macroinvertebrate and Water Temperature Study performed in support of the relicensing process, and an evaluation of the historical operation of the Project. As presented in the Plan, the Parties have agreed that passing sediments at higher flows through the Project's deep sluice gate(s) is necessary to manage the sediments naturally associated with the river.

### 3.4 Fish Movement and Protection

Within 8 years of license issuance, or when the existing trashracks need replacing, whichever is sooner, the Licensee shall, at its discretion, either 1) install seasonal trashrack overlays with 1.0-inch clear spacing over the full length and on the upstream face of the existing trashracks or 2) replace the full length of the existing trashracks with trashracks with 1.0-inch clear spacing. Prior to pursuing the alternative to install seasonal overlays, the Licensee will consult with the DEC and FWS regarding the season that the seasonal overlays would need to be in place.

The requirements of this trashrack commitment may be curtailed or suspended if required by operating emergencies beyond the control of the Licensee, including security, and for limited periods upon prior mutual agreement between the Licensee, FWS, and DEC. If the requirements of this commitment are so modified, the Licensee shall notify

November 2, 2004

the FERC as soon as possible, but no later than ten (10) business days after each such incident.

#### 3.4.1 Justification

##### Fish Movement

The Parties concluded that fish movement associated with the current Project is consistent with the fish management policies and programs for the Salmon River. Therefore, no upstream or downstream fish movement structures are proposed at this time.

##### Fish Protection

The Parties concluded that fish protection, in the form of trashracks with 1.0-inch clear spacing, or seasonal overlays with 1.0-inch clear spacing should be installed at the Project. Accordingly, the Licensee agrees to replace the existing trashracks with trashracks with 1.0-inch clear spacing or install seasonal overlays at the Macomb Project within 8 years of license issuance, or when the existing trashracks need replacing, whichever is sooner. The use of seasonal overlays would provide the necessary fish protection and help reduce operational concerns associated with winter ice conditions.

November 2, 2004

### 3.5 Fish Stocking

Within 24 months of license issuance, the Licensee, in consultation with the DEC, will install a fish stocking tube that would allow the DEC to stock fish directly into the Project's tailrace. The Licensee will maintain the fish stocking tube, and the DEC will be responsible for all stocking activities. The DEC shall notify the Licensee at least five working days prior to use of the fish stocking tube.

### 3.6 Flow and Water Level Monitoring

The Licensee shall develop a stream-flow and water-level monitoring plan in consultation with the DEC and FWS within 6 months of license issuance. The monitoring plan shall include all gages and/or equipment to:

- Determine headpond elevations as needed;
- Monitor flow through the Project turbines, sluice gates, and spillways; and
- Provide an appropriate means of independent verification of water levels by the DEC and FWS.

All gages and ancillary equipment required by the monitoring, including headpond gages, shall be made operational and fully calibrated within 15 months of license issuance.

The monitoring plan shall contain provisions for the installation of binary staff gages at appropriate locations to permit independent verification of headpond water levels. Binary staff gages will be visible to the general public. Access to staff gages shall be provided to the DEC, FWS, and/or their authorized representatives.

The Licensee shall keep accurate and sufficient records of the impoundment elevations and all Project flows to the satisfaction of the DEC and shall provide such data in a format and at intervals as required by the DEC. The DEC will provide the Licensee with a contact person to receive such information. All records will be made available for inspection at the Licensee's principal business office within New York State within five

November 2, 2004

---

business days or will be provided in written form within 30 days of the Licensee's receipt of a written request for such records by the DEC. Furthermore, the Licensee will provide to the DEC a seven-day-per-week contact person to provide immediate verification of monitored flows and responses to questions about abnormal or emergency conditions.

The Licensee shall keep accurate and sufficient records of any uncontrollable station outage that causes a reduction in the required baseflow from the Macomb Project. The Licensee will consult with the DEC to develop a plan for reporting these types of incidents. The reporting plan shall be finalized within 12 months of license issuance.

### 3.7 Fish Passage and Section 18

No fishways are being required as part of this settlement agreement. The U.S. Department of the Interior will reserve its authority under Section 18 of the Federal Power Act to prescribe upstream or downstream fish passage facilities in the future. This reservation ensures that adequate facilities for fish passage can be required should management goals or needs change during the life of the license.

November 2, 2004

#### **4.0 RECREATION ENHANCEMENT COMMITMENTS (Not to be Included in License)**

##### **4.1 Impoundment Car-Top Boat Launch**

Within 12 months of license issuance, the Licensee agrees to enhance the existing car-top boat launch on the Town of Malone property adjacent to the Macomb impoundment on Lower Park Street by providing signage and matting for the launch area. The area will be maintained by the Town of Malone.

##### **4.2 Recreational Trail**

Within 12 months of license issuance, the Licensee, in consultation with the Town of Malone, agrees to develop a trail and parking area on the Licensee's property immediately north of the Project. The Licensee will develop the trail and parking area (e.g., design, perform grading, clearing, and provide signage). Through a written agreement between the Licensee and the Town of Malone, the Town will be responsible for maintenance of the trail area and for all insurance requirements. See Attachment B for the map of the proposed recreational trail.

##### **4.3 Additional Recreational Facilities**

The Parties agreed that no additional recreational facilities are required as part of this Settlement Agreement. This conclusion is based on a field review of the recreational facilities that presently exist within the vicinity of the Project area. Such facilities include: 1) informal fishing access to the impoundment on the Town of Malone property described in Section 4.1; 2) the downstream angler access trail; and 3) the informal parking and shoreline fishing area along the facility's driveway.

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** American Rivers

**By:**

  
Mr. Andrew Fahlund

**Title:** Senior Program Director  
~~Hydropower Reform Coalition Chair~~

**Date:**

11/12/04



November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** American Whitewater

**By:**   
Mr. Kevin Colburn

**Title:** Eastern Conservation/Access Director

**Date:** 11/12/04

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** Erie Boulevard Hydropower, L.P.

**By:** David J. Youlen  
Mr. David J. Youlen

**Title:** Vice President New York Operations

**Date:** 11/5/04

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** Franklin County

**By:** James N. Feely  
Mr. James N. Feely

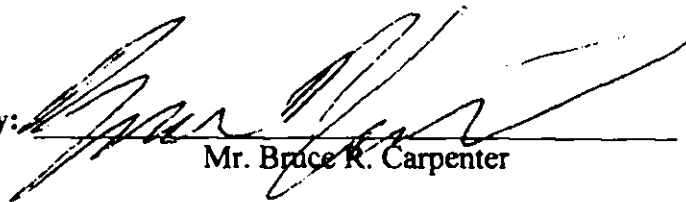
**Title:** County Manager

**Date:** 11/5/04

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** New York Rivers United

**By:**   
Mr. Bruce R. Carpenter

**Title:** Executive Director

**Date:** 11/04/04

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** New York State Conservation Council

**By:** Howard Cushing, Jr.  
Mr. Howard O. Cushing, Jr.

**Title:** President

**Date:** 11/8/04

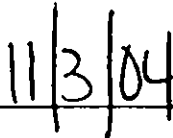
November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** New York State Department of Environmental  
Conservation

**By:**   
Ms. Lynette Stark

**Title:** Deputy Commissioner

**Date:**   
11/3/04

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**RESERVED**

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** Town of Malone

**By:** *Howard F. Maneely*  
Mr. Howard F. Maneely

**Title:** Town Supervisor

**Date:** *11/10/04*

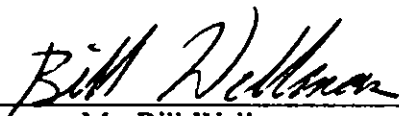


November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** New York State Council of Trout Unlimited

**By:**



Mr. Bill Wellman

**Title:** V.P. Region 5 N.Y.S. Council of Trout  
Unlimited

**Date:**



November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** U.S. Department of the Interior,  
U.S. Fish and Wildlife Service

**By:**   
Mr. Marvin Moriarty

**Title:** Regional Director

**Date:** NOV 23 2004

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** U.S. Department of the Interior,  
National Park Service

**By:**   
Mr. Steve Golden

**Title:** Program Manager, Rivers and Trails

**Date:** 11/12/04

November 2, 2004

**SETTLEMENT AGREEMENT  
MACOMB PROJECT**

**Organization:** Village of Malone

**By:**   
Mr. Brent Stewart

**Title:** Mayor

**Date:** 11/9/2004